



SUPREME COURT OF CANADA

CITATION: B.J.T. v. J.D., 2022 SCC
24

APPEAL HEARD: December 1
and 2, 2021

JUDGMENT **RENDERED:**
December 2, 2021

REASONS FOR JUDGMENT: June
3, 2022

DOCKET: 39558

BETWEEN:

B.J.T.
Appellant

and

J.D.
Respondent

- and -

**Director of Child Protection for the Province of Prince Edward Island
and LGBT Family Coalition**
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

REASONS FOR Martin J. (Wagner C.J. and Moldaver, Karakatsanis, Côté,
JUDGMENT: Brown, Rowe, Kasirer and Jamal JJ. concurring)
(paras. 1 to 114)

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B.J.T.

Appellant

v.

J.D.

Respondent

and

**Director of Child Protection
for the Province of Prince Edward Island
and LGBT Family Coalition**

Interveners

Indexed as: B.J.T. v. J.D.

2022 SCC 24

File No.: 39558.

Appeal heard: December 1, 2, 2021.
Judgment rendered: December 2, 2021.
Reasons delivered: June 3, 2022.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR PRINCE EDWARD ISLAND

Family law — Child protection — Custody — Best interests of child — Standard of appellate review for disposition decisions pursuant to child protection legislation — Child found in need of protection from mother — Maternal grandmother and father submitting competing parenting plans at disposition hearing — Custody of child awarded to grandmother — Father successfully appealing order — Whether appellate intervention was warranted — Whether hearing judge erred in determination of child’s best interests — Whether natural or biological parent factor should be considered in determination of best interests of child — Child Protection Act, R.S.P.E.I. 1988, c. C-5.1, s. 2(2).

In January 2018, a four-year-old child was apprehended by the Director of Child Protection in Prince Edward Island (“Director”), giving rise to lengthy child protection proceedings. The child’s parents had a turbulent relationship. They were married in May 2012 and then lived together in Alberta. In 2013, the mother left the father and moved to Prince Edward Island after an alleged incident of domestic violence. At the time, the father was unaware that the mother was pregnant. The mother struggled to care for the child after he was born in October 2013, as she battled significant mental health challenges. When the child was three months old, the maternal grandmother arrived in Prince Edward Island and, for approximately two years, lived with the child and the mother, supported them financially and provided daily care to the child. The grandmother left for approximately one year and then returned to Prince Edward Island in March 2017 and resumed her role as the child’s caregiver. This arrangement ended abruptly in August 2017 when the mother’s condition worsened

and she refused to allow the grandmother to contact the child. A few months later the child was apprehended by the Director. A court found the child was in need of protection, and the Director was granted temporary custody of the child.

After the child was placed in the Director's temporary custody, the Director entered into a foster parenting agreement with the grandmother and placed the child in her day-to-day care. The father was contacted by the Director in February 2019 and advised that he had a child. He wanted the child to live with him in Alberta and began to prepare for parenthood. He retained the services of an expert psychologist and flew to Prince Edward Island to meet the child in June 2019, where daily and then unsupervised visits were allowed by the Director. Shortly before his visit, the grandmother informed the Director about allegations of violence by the father. The Director continued to allow the father to visit the child and amended its application to support the father's bid for permanent custody. During the father's visit, the grandmother filed a motion for an order designating her a "parent" under the *Child Protection Act*, which was granted in early July. The next day, the Director ended the foster parenting arrangement with the grandmother and removed the child from her care, placing him with foster parents. Four weeks later, the Director sent the child to Alberta for a second visit with the father. The Director then decided to make the visit indefinite.

The grandmother and the father both sought permanent custody of the child. At a disposition hearing in Prince Edward Island, it was concluded that it was in

the child's best interests to be placed with the grandmother. The hearing judge found that the grandmother would promote the child's relationship with the father and his family, but the father would not ensure the child would have a meaningful relationship with his family in Prince Edward Island unless ordered by the court. The hearing judge also found the Director's goal was to assist the father to become the child's parent without considering the possibility of the grandmother as the child's guardian. A majority of the Court of Appeal reversed this decision and granted custody to the father. It concluded that the hearing judge considered an irrelevant factor, being the Director's conduct, and failed to consider the father's argument that as a natural parent, his custody claim should be favoured.

Held: The appeal should be allowed and the order of the hearing judge restored.

The Court's decision in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, governs as the applicable standard of review when assessing a hearing judge's conclusions concerning custody in a child welfare context. The guiding principle and paramount consideration in custody matters is the best interests of the child, as it is under s. 2(2) of the *Child Protection Act*. In this legislation, as in others, no priority is given to one factor over the other. The question of which factors are relevant, and what weight should be apportioned to them, is a matter of judicial discretion with regard to the evidence before the court. As a result, an appellate court must act with restraint when reviewing a hearing judge's conclusions concerning

custody in a child welfare context and may only intervene where there has been a material error, a serious misapprehension of the evidence, or an error in law. Significant deference is owed to a determination made by a judge at first instance of which custody arrangement is preferable in light of a child's best interests and an appellate court is not permitted to redo a lower court's analysis to achieve a result that it believes is preferable in the best interests of the child. Nothing in s. 2(2) of the *Child Protection Act* supports or suggests a different standard of appellate review. In the instant case, in awarding permanent custody to the father, the majority of the Court of Appeal failed to afford the appropriate level of deference to the hearing judge's assessment. The hearing judge's determination of the child's best interests was grounded in a thorough assessment of the extensive evidence in the proceedings. In light of the evidentiary record, the hearing judge conducted an assessment that disclosed no material error, serious misapprehension of the evidence, or legal error.

The hearing judge's consideration of the Director's conduct did not inappropriately taint her analysis. No general principle prevents a judge on a best interests of the child analysis from considering the actions of a child protection agency. Such inquiries are not only permissible, they may in some circumstances be required on account of the court's essential oversight role in child welfare matters and its *parens patriae* jurisdiction. A judge has the authority to address how the child protection agency's decisions may have serious implications in the best interests analysis. An agency's conduct may have shaped, even defined, the factual matrix before the court, including the parties' positions and conduct and the status quo relevant to a child's best

interests. A court is entitled to look behind the veil of an existing status quo to understand how it came about and to assess whether that status quo is itself in the child's best interests. Faced with representations from a child protection agency regarding the fitness of parents, a court should not be prohibited from considering the manner in which the agency investigated and treated the parties involved to assess the weight that can be placed on such evidence or arguments. In the present case, after the initial apprehension, the Director directed every aspect of the child's life: where and with whom he lived, where he went to school, and who could see him when and the terms of their access. It was, therefore, not a legal error for the hearing judge to consider the Director's conduct insofar as it allowed her to gain an understanding of what had happened, how a certain status quo was created, and the conduct and position of the parties. It was open to the hearing judge to take into account the different treatment provided to the father and the grandmother and to conclude that the Director promoted the child's relationship with his father over the pre-existing connection with the grandmother. The hearing judge was also allowed to consider how any unbalanced facilitation of access the Director gave to each parent would have had an impact on their bond with the child.

The hearing judge could also turn to the Director's evidence and conduct to allow her to properly assess (1) the claims made by the father and the grandmother as to their appetite and ability to facilitate access with the other parent, and (2) the impartiality of the expert witness and the weight to be given to her evidence. The hearing judge was obliged to consider the objectivity and impartiality of the expert

opinion evidence to ascertain both its threshold admissibility and the weight that should ultimately be ascribed to it. The hearing judge was well within her authority to conclude that while the expert psychologist's evidence was probative insofar as it spoke to the father's parenting abilities, her evidence merited less weight when she opined on the child's ultimate placement. The hearing judge committed no reviewable error and was entitled to determine the weight to be given the expert's opinion.

Furthermore, the hearing judge made no error in her approach to the father's biological tie to the child. While it is not an error for a court to consider a biological tie in itself in evaluating a child's best interests, a biological tie should generally carry minimal weight in the assessment. A parent's mere biological tie is simply one factor among many that may be relevant to a child's best interests and judges are not obliged to treat biology as a tie-breaker when two prospective custodial parents are otherwise equal. Placing too great an emphasis on a biological tie may lead some decision makers to give effect to the biological parent's claim over the child's best interests and parental preferences should not usurp the focus on the child's interests. A child's bond is a consideration that should prevail over the "empty formula" of a biological tie. A biological connection is no guarantee against harm to a child and a child can be equally attached to persons who are not their biological parents and those persons can be equally capable of meeting the child's needs. In addition, the benefit of a biological tie itself may be intangible and difficult to articulate, which makes it difficult to prioritize it over other best interests factors that are more concrete. The importance of a biological tie may also diminish as children are increasingly raised in

families where those ties do not define a child's family relationships. Further, courts should be cautious in preferring one biological tie over another absent evidence that one is more beneficial than another. Comparing the closeness or degree of biological connection is a tricky, reductionist and unreliable predictor of who may best care for a child. In the instant case, none of the enumerated factors in s. 2(2) of the *Child Protection Act* specifically relate to a parent's biological tie; therefore, a court is not directed to consider a child's biological relationship with the party seeking custody. The Court of Appeal overstated the importance of the father's biological tie to the child. The hearing judge was not compelled to decide in favour of the father after concluding the two parties were more or less equal. It was open to her to dispose of the case based on a factor that she considered more significant: the question of which parent was more likely to maintain the child's relationship with the other parent.

Cases Cited

Applied: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; **considered:** *King v. Low*, [1985] 1 S.C.R. 87; **referred to:** *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *Gordon v. Goertz*, [1996] 2 S.C.R. 27; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R. 519; *Beson v. Director of Child Welfare (Nfld.)*, [1982] 2 S.C.R. 716; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398; *Thomson v. Thomson*, [1994] 3 S.C.R. 551; *White Burgess Langille Inman v. Abbott and Haliburton*

Co., 2015 SCC 23, [2015] 2 S.C.R. 182; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *The Queen v. Lupien*, [1970] S.C.R. 263; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *Re Baby Duffell: Martin v. Duffell*, [1950] S.C.R. 737; *Hepton v. Maat*, [1957] S.C.R. 606; *Re Agar; McNeilly v. Agar*, [1958] S.C.R. 52; *Young v. Young*, [1993] 4 S.C.R. 3; *Frame v. Smith*, [1987] 2 S.C.R. 99; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; 2747-3174 *Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165; *Racine v. Woods*, [1983] 2 S.C.R. 173; *British Columbia Birth Registration No. 99-00733, Re*, 2000 BCCA 109, 73 B.C.L.R. (3d) 22.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.

Child Protection Act, R.S.P.E.I. 1988, c. C-5.1, ss. 1(s), 2(2), 27, 29, 30, 36, 37, 38(2)(c), (d), (e), 41.

Child, Youth and Family Enhancement Act, R.S.A. 2000, c. C-12, s. 2(1).

Children's Law Act, R.S.P.E.I. 1988, c C-6.1, s. 33.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 16(3).

Family Law Act, S.A. 2003, c. F-4.5, s. 18.

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Bala, Nicholas. "Bringing Canada's *Divorce Act* into the New Millennium: Enacting a Child-Focused Parenting Law" (2015), 40 *Queen's L.J.* 425.

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APPEAL from a judgment of the Prince Edward Island Court of Appeal (Jenkins C.J. and Murphy and Mitchell JJ.A.), 2020 PECA 14, [2020] P.E.I.J. No. 48 (QL), 2020 CarswellPEI 73 (WL), setting aside a decision of Key J., 2020 PESC 23, [2020] P.E.I.J. No. 25 (QL), 2020 CarswellPEI 44 (WL). Appeal allowed.

Ryan Moss and *Christiana Tweedy*, for the appellant.

Jonathan Coady, Q.C., and *Sophie MacDonald, Q.C.*, for the respondent.

Mitchell M. O'Shea, for the intervener the Director of Child Protection for the Province of Prince Edward Island.

Laura Cárdenas, for the intervener LGBT Family Coalition.

The reasons for judgment of the Court were delivered by

MARTIN J. —

I. Introduction

[1] This appeal concerns a custody dispute over a child who was apprehended at the age of four by the Director of Child Protection in Prince Edward Island (“Director”).¹ At the disposition hearing under s. 37 of the *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1, which occurred when the child was six, both his father in Alberta and his maternal grandmother in Prince Edward Island sought permanent custody. The hearing judge concluded that it was in the boy’s best interests to be placed with his grandmother, who had cared for him extensively throughout his life. A majority of the Court of Appeal reversed this decision and granted custody to the father, who had only learned he had a child when the boy was five years old and had only recently begun to have a relationship with him.

[2] At the conclusion of the appeal, we unanimously allowed the appeal. We set aside the decision of the Court of Appeal and restored the order of the hearing judge awarding the permanent custody and guardianship to the grandmother pursuant to s. 38(2)(e) of the *Child Protection Act*. Under the terms of the hearing judge’s final

¹ I recognize that there has been a shift from the terminology of “custody” and “access” to such terms as “decision-making responsibility” and “parenting time”. This shift is codified in some legislation, including the new *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and the recently enacted *Children’s Law Act*, R.S.P.E.I. 1988, c. C-6.1, in P.E.I. — the jurisdiction where this dispute arises. Notwithstanding these changes, the dispute before the Court is governed by the P.E.I. *Child Protection Act*, R.S.P.E.I. 1988, c. C-5.1, which speaks in reference to the concepts of “custody” and “access”. The language in my reasons reflects the language in the governing statute.

disposition, the grandmother was immediately entitled to the custody and guardianship of the child in P.E.I., and the Director was required to return him to the grandmother within two weeks of the decision. However, with the school year under way, to mitigate the foreseeable disruption and stress to the child, the Court permitted him to remain with the father in Alberta until March 21, 2022, which marked the commencement of the Alberta spring break. Thereafter, the child was to be returned to P.E.I. at the expense of the Director.

[3] This judgment was made without prejudice to any rights that either party may have to make an application to the Supreme Court of Prince Edward Island relating to all questions of custody and access.

[4] Below, I provide the reasons for this Court's judgment, explaining why the hearing judge made no legal errors that warranted appellate intervention and why that initial decision was entitled to deference.

II. Factual Background

[5] This appeal has a long, complicated history.

[6] At the time the appeal was heard, W.D. was an eight-year-old child with high functioning autism. Those who know him report he is bright, energetic, loving, and very good with numbers. Since his diagnosis, he has received a variety of

professional supports for his needs, including speech language pathology and occupational therapy services.

[7] W.D.'s mother and father (the respondent) met in June 2011, were married in May 2012, and lived together in Calgary, Alberta, with W.D.'s half-brother, who is the mother's child with a previous partner. The appellant, W.D.'s grandmother, also resided in Calgary and before the mother and father moved into their own home, they and the half-brother lived with her.

[8] By all accounts, W.D.'s mother and father had a turbulent relationship. The father was arrested three times for violence and threats against the mother and entered into two peace bonds. The father testified that the relationship was "rocky", blamed the mother for that, and denied he was ever violent towards her.

[9] The grandmother testified that in March 2013, W.D.'s mother arrived at her home with significant injuries and reported that W.D.'s father had beaten her. This incident not only contributed to the end of the mother and father's relationship, it led to W.D.'s half-brother being removed from the mother's care by child welfare authorities in Alberta and placed in the sole custody of his father in P.E.I. The mother left W.D.'s father and followed the half-brother to P.E.I. shortly afterwards. The mother and father finalized their divorce in 2014.

[10] W.D. was born in P.E.I. in October 2013. When W.D.'s mother left for P.E.I., W.D.'s father was unaware she was pregnant. He did not learn he had a son until

the Director contacted him in the context of these proceedings in February 2019. W.D.'s half-brother continues to reside in P.E.I. and has maintained a close relationship with W.D. since his birth.

[11] W.D.'s mother tried to raise W.D. on her own but she struggled to care for her newborn as she battled significant mental health challenges. As the mother's difficulties with parenting W.D. became clear, the grandmother quit her job, left her home in Alberta, and moved to P.E.I. to help. W.D. was around three months old when his grandmother first arrived in early 2014.

[12] Once she moved to P.E.I., the grandmother was deeply involved in his care. She lived with W.D. and the mother, supported them financially, and provided daily care to W.D. This arrangement lasted for approximately two years until March 2016, after which she returned to Alberta. The grandmother returned to P.E.I. in March 2017 and she resumed her role as W.D.'s caregiver. Though she did not live with W.D. at this time, she provided financial support and W.D. frequently visited her home.

[13] This arrangement ended abruptly in August 2017 when the mother's condition worsened and she refused to allow the grandmother to contact W.D.

[14] A few months later, in January 2018, when W.D. was four years old, the Director apprehended W.D. from his mother without a court order. The Director believed W.D.'s mother was unable to provide adequate supervision or protection for W.D. on her own, given her continuing battle with mental illness. After many

postponements, a combined protection and disposition hearing was eventually held (see *Child Protection Act*, ss. 36-37). On May 29, 2018, Justice Matheson found that W.D. was in need of protection from his mother and gave temporary custody of W.D. to the Director for three months.

[15] When the grandmother learned W.D. was apprehended, she took the necessary steps so that she could become his foster parent. In June 2018, two weeks after the initial protection order was granted, the Director entered into a foster parenting agreement with the grandmother and placed W.D. in her day-to-day care.

[16] While the foster parenting agreement was ongoing, the Director informed W.D.'s father in February 2019 that he had a son. After paternity was confirmed, the father wanted to have his son reside with him in Alberta, and began to prepare for parenthood. He took a parenting course and retained the services of a psychologist. The father is diagnosed with Asperger's Syndrome and describes himself as someone with autism who is high functioning.

[17] In May and June 2019, the grandmother notified the Director about allegations of violence by the father, some of which impacted W.D.'s half-brother. The Director arranged an interview with the half-brother, but before this interview, and before W.D. had met his father, the Director amended its application to support the father's bid for permanent custody. The interview with the half-brother took place a few days after the amendment of the application.

[18] The half-brother recounted that he observed violence between W.D.'s father and his mother, that he had once jumped on the father's back in an attempt to protect his mother and that he had been thrown against a wall by the father, and that he feared the father.

[19] On June 24, 2019, some three days after the half-brother's interview, the Director continued to allow the father to have his first visit with W.D. as they planned in late May or early June.

[20] On June 24, 2019, the father flew to P.E.I. with his parents and the psychologist that he hired and they were all introduced to W.D. The Director allowed daily visits for the father over this two-week period. In that brief time, his visits went from fully supervised to completely unsupervised overnight stays.

[21] On June 20, 2019, the grandmother filed a motion for an order designating her a "parent" under s. 1(s) of the *Child Protection Act*. With this designation, the grandmother would have the statutory rights of a parent, including the right to file a parenting plan at the disposition hearing to outline a proposal for placing W.D. in her permanent custody (s. 37(1.2)). The Director opposed the motion.

[22] The motion judge concluded the grandmother met the statutory definition of a parent because she had stood *in loco parentis* to W.D. for a period of not less than one year and has a continuing relationship with him. The grandmother had stood *in loco parentis* during two periods: the two years after she arrived in P.E.I. soon after

W.D.'s birth and until she temporarily returned to Alberta, and again when she acted as W.D.'s foster parent after his apprehension in January 2019. Further, the motion judge found the grandmother had an uninterrupted relationship with W.D. since he was an infant, despite the relationship facing numerous challenges. The court order recognizing the grandmother's legal status as a "parent" of W.D. was effective as of July 2, 2019.

[23] The next day, on July 3, 2019, the Director ended the foster parent arrangement with the grandmother and removed W.D. from her care without notice. W.D. left his grandmother's home for camp like normal, but he was apprehended by the Director who has never allowed him to return. The Director instead chose to place W.D. with foster parents, who were strangers to him. While this foster parent arrangement was in place, the Director allowed the grandmother to have supervised visits with W.D. for four hours per week.

[24] The Director said that W.D.'s removal from his grandmother's care was because of the grandmother's "negative messaging" to W.D. about his father. However, the hearing judge accepted the grandmother's evidence she had never engaged in such conduct.

[25] On July 31, 2019, the Director appealed the order designating the grandmother a parent. That appeal was heard on December 9, 2019 and dismissed on December 12, 2019.

[26] Approximately four weeks into the new foster parenting arrangement, the Director elected to send W.D. to Alberta for a second visit with his father. The trip, which began on August 8, 2019, was to last three weeks, but W.D. has never returned to P.E.I.

[27] Thereafter, the Director hired the same psychologist retained by the father to assess the father's parenting ability. On August 22, 2019, the psychologist recommended that W.D. remain in Alberta with his father. Shortly after, the Director decided to make the visit indefinite and enrolled W.D. in school in Alberta. Thus, when the disposition hearing on permanent custody eventually took place in February 2020, the Director had allowed W.D. to remain in Alberta with his father since the previous summer.

[28] After W.D. arrived in Alberta, the Director limited the grandmother's access. Other than video calls, the Director had not permitted W.D. to see his grandmother for six months. However, just two weeks before the disposition hearing, the Director allowed the grandmother to travel to Alberta to have her first in-person visit over the course of a single weekend. The Director placed several conditions on the grandmother's visit: her time with W.D. was supervised, limited to public spaces, and capped at seven hours over three days. The Director denied the grandmother's request for an overnight stay with W.D. at her hotel and gave no reasons for requiring supervised visits.

[29] After months of delays, a review hearing of the initial apprehension order that was initially scheduled for October 3, 2018 finally took place on January 13-15, 2020 (2020 PESC 9). W.D. remained in need of protection from his mother and a disposition hearing was ordered to settle permanent custody.

III. Judicial History

A. *Disposition Hearing under Section 37 of the Child Protection Act: Supreme Court of Prince Edward Island, 2020 PESC 23 (Key J.)*

[30] The disposition hearing was scheduled over three days in February 2020, followed by a single day of oral submissions in March 2020. Given that W.D. had been in the temporary custody of the Director in excess of the statutorily permitted timelines, a further temporary custody order pursuant to s. 38(2)(c) of the *Child Protection Act* was not permitted. Rather, the court was required to place W.D. in the permanent custody and guardianship of either the Director (s. 38(2)(d)) or a “parent” (s. 38(2)(e)).

[31] Pursuant to s. 37, the father and the grandmother filed plans of care. W.D.’s mother refused to participate and the *amicus curiae* was unable to elicit a plan that she might wish to advance. The father filed a plan to have W.D. remain in Alberta and sought “full and sole custody” (para. 145 (CanLII)). The grandmother proposed a plan whereby she would “continue to do for W.D. what she has always done, namely, provide him with a loving home and all of the resources which he had prior to being taken away from her” (para. 191). She sought to have W.D. returned to P.E.I., where

he could maintain his relationship with his half-brother and continue visits with his mother.

[32] While acknowledging that there were concerns around the grandmother's "negative messaging", the Director submitted that there were no protection concerns regarding either parent. The Director abandoned its previous endorsement of the father's plan and took no formal position on permanent custody. Despite this asserted position, the hearing judge found that the Director made a series of decisions in an attempt to "tip the scales" in the father's favour.

[33] Although the apprehension of W.D. by the Director meant that the proceedings were governed by the *Child Protection Act*, what was placed before the court was a "disguised" custody battle (para. 11). The hearing judge recognized that the sole issue was whether W.D.'s best interests favoured permanent custody with his father or his grandmother. The hearing judge awarded custody to the grandmother.

[34] The hearing judge premised her analysis on an extensive review of the evidence from nine witnesses, which included protection and access workers from P.E.I. and Alberta, the father, the mother of W.D.'s father, the psychologist, the grandmother, W.D.'s half-brother and the half-brother's father. She summarized the evidence of each witness on a per witness basis and made express findings about their credibility and reliability and explained the weight she assigned to their evidence.

[35] In regards to the expert evidence of the psychologist, the hearing judge observed that while it is not always necessary for a parent to provide expert opinion evidence about their ability to parent, given the unique factors in this case, such evidence was relevant and necessary. She qualified the father's psychologist as an expert in psychology with a specialty in children and the parenting of children and admitted her report.

[36] The hearing judge accepted the expert psychologist's evaluation of the father's parenting ability because it was "objective and unbiased" (para. 109). She noted that the expert psychologist travelled with the father for the two-week period in which he met W.D. She had spent much time with the father, was in contact with a number of the child protection workers in P.E.I. and Alberta, and continued to provide guidance and advice to the father.

[37] The hearing judge, however, assigned less weight to the expert psychologist's view on the ultimate issue of whether permanent custody with the father was in W.D.'s best interests. She noted that the expert psychologist recommended to the Director that W.D. remain in Alberta, a recommendation with which the Director had "quickly agreed" (para. 108). The hearing judge concluded that when the psychologist stepped outside of commenting on the father's ability to parent and opined about where W.D. should ultimately live, she had shown "a bias towards [the father] and she moved from being objective and nonpartisan to being an advocate for [the father]" (para. 109). She explained further that "her involvement with [the father] and

his family may have clouded her view that any other parenting arrangement for W.D. would have been equally as beneficial” (para. 109), and that because she has never met W.D.’s mother or grandmother, “what little she knows of W.D.’s PEI family has been provided to her by the Director’s workers” (para. 110). The hearing judge concluded: “Therefore, while I accept the evidence of [the father’s] ability to parent, I have placed less weight on [the expert psychologist’s] opinion in terms of my ultimate decision” (para. 110).

[38] The hearing judge then tied the evidence she accepted from the numerous witnesses to each of the relevant statutory best interests of the child factors under s. 2(2) of the *Child Protection Act*. In doing so, she found: W.D. was safe with either parent (s. 2(2)(a)), there were no concerns with the ability of either parent to access care or treatment to meet W.D.’s physical, mental and emotional needs (s. 2(2)(c)), both parents had the capacity to ensure that W.D.’s developmental needs are met (s. 2(2)(d)), and either home would provide for W.D.’s security and the development of a positive relationship within the particular family with whom he resides (s. 2(2)(f)). Based on these considerations, the grandmother and the father — who were both parents for the purposes of her analysis — were “more or less equal in their ability to care for W.D.” (para. 215).

[39] However, her inquiry did not end there as there was “another factor” that, when duly considered, militated in favour of a grant of custody to the grandmother (para. 214). For the hearing judge, the primary differentiating factor was the

grandmother's willingness to support and promote W.D.'s relationship with the father and his family. The hearing judge accepted the grandmother's evidence that she could "set aside any hard feelings toward [the father] and his family for W.D.'s sake", that she would be respectful and allow W.D. to maintain contact with his father, and that she had "no issue flying with W.D. to Alberta and leaving W.D. with [his father] and his family for weeks at a time" (para. 192-93). The father, on the other hand, was resistant to committing to ensuring a meaningful relationship with the grandmother and W.D.'s then 17-year-old half-brother.

[40] The hearing judge noted that W.D. had the right to the love, affection, and ties of both families (s. 2(2)(g)). She found as a matter of fact that the grandmother would promote the relationship with the father and his family but, unless ordered by the court, the father would not ensure W.D. would have a meaningful relationship with his P.E.I. family.

[41] In arriving at her decision, the hearing judge was attuned to the Director's handling of W.D.'s file, noting that at the time of the hearing, W.D. "continue[d] to remain in the custody and guardianship of the Director notwithstanding the review hearing took place approximately 20 months after he was apprehended, well beyond the statutorily mandated time limits" (para. 7). She concluded that the Director removed W.D. from his grandmother's care and placed him in foster care "for flimsy reasons" (para. 8). She also observed that the Director supported the father's parenting

plan before having ever met him and even before father and son had even been introduced to each other.

[42] She concluded that the actions of the Director's delegates effectively demonstrated that they only considered two options for W.D.: permanent custody with either the father, or the Director. Hence, despite the significant progress W.D. had made in the more than one year of his grandmother's day-to-day care, W.D.'s family in P.E.I. was being disregarded in favour of the father. The "unstated goal" of the Director was to assist the father in becoming W.D.'s everyday parent (para. 89), without consideration of the possibility of the grandmother acting as W.D.'s permanent guardian. Moreover, the hearing judge found that the Director's conduct "effectively tied the court's hands preventing it from making a comprehensive custodial order with respect to W.D.'s future" (para. 90). That said, she expressly acknowledged that the focus of the hearing was not on blame, and reiterated that the "sole focus must be and is the best interests of W.D." (para. 91).

B. *Court of Appeal for Prince Edward Island, 2020 PECA 14 (Jenkins C.J.P.E.I. and Murphy and Mitchell J.J.A.)*

[43] The majority of the Court of Appeal agreed with two of the father's grounds of appeal, and concluded that the hearing judge (1) considered an irrelevant factor, being the Director's conduct; and (2) failed to consider the father's principal argument that as a natural parent, the "parental preference" favoured his custody claim.

[44] On the first ground, the majority concluded that the hearing judge “allowed her distaste for the Director’s behaviour, an irrelevant consideration, to impact her assessment of the best interest of the child by giving less weight to [the expert psychologist’s] opinion” (para. 79 (CanLII)). There was no basis for the conclusion that the expert psychologist showed bias. The psychologist was clear her expert report was intended to opine on the father’s parenting ability; she did not opine on the grandmother, nor on whether an alternative parenting arrangement was beneficial. What the Director may or may not have done on the psychologist’s advice was irrelevant: the focus was to be solely on W.D.’s best interests.

[45] On the second ground, the majority found that the hearing judge failed to grapple with the father’s principal legal argument that a child’s welfare is best served in the custody of their natural parents and that natural parents should be deprived of custody only when clearly necessary. In doing so, she denied the father’s right to be heard. Moreover, it concluded that when a parent and non-parent are “more or less equal” after all relevant factors are considered, or when the non-parent is only slightly better, the “natural parent factor” is decisive (para. 113).

[46] Rather than remit the matter, the majority concluded that W.D.’s best interests favoured permanent custody with his father. In arriving at its own determination, the majority accepted all of the hearing judge’s findings of fact, but afforded what it deemed as appropriate weight to the expert psychologist’s evidence and factored in the natural parent factor.

[47] Jenkins C.J.P.E.I., in dissent, would have dismissed the appeal. He found that reading the judgment as a whole, the hearing judge carefully assessed and balanced all of W.D.'s best interests. There was no basis for appellate intervention.

[48] On the first ground of appeal, he opined that the hearing judge was not put off track when she considered the Director's actions. A judge can consider the surrounding context when assessing a child's best interests. Here, that context included the Director and the father's joint goal of securing the father's custody of W.D. Nor did the hearing judge err in her finding that the expert psychologist went beyond her mandate and became an advocate for the father when she made a recommendation to the Director that W.D. remain in Alberta. The hearing judge was entitled to distinguish between the psychologist's professional opinion on the father's parenting ability and her recommendation that W.D. remain in Alberta until the disposition hearing.

[49] On the second ground, Jenkins C.J.P.E.I. concluded that the hearing judge's failure to discuss the father's argument on the "parental presumption principle" was not a material error (para. 184). The hearing judge dealt with the father's natural bond without naming the natural parenting principle. She was aware that the father was W.D.'s biological father and aware of his developing bond with W.D. The father's submissions on the natural parent factor ignored key considerations, including: W.D.'s strong bond with his grandmother, the grandmother's status as a parent, and the hearing judge's finding that the grandmother was more likely to maintain W.D.'s relationship with the father than vice-versa. The hearing judge concluded all things were not equal

in this case: the grandmother would promote W.D.'s other familial bonds, whereas the father would not without a court order. This conclusion was "her call to make" (para. 203).

IV. Issues

[50] Based on how the case was argued, three issues emerge for consideration:

1. When can an appellate court intervene in determining the best interests of a child — i.e. what is the standard of review for disposition decisions pursuant to child protection legislation?
2. Did the hearing judge err in her determination of the child's best interests in the case at bar?
3. How does the natural or biological parent factor weigh in determining the best interests of a child in a child protection matter?

V. Analysis

[51] I answer each issue in turn and conclude that significant deference is owed to a judge's determination of which custody arrangement is preferable in light of a child's best interests. Appellate intervention is only warranted where a judge makes a material error, a serious misapprehension of the evidence, or an error in law. This

standard was not met in this case. The hearing judge did not err in concluding that it was in W.D.'s best interests to be placed in his grandmother's custody. Her analysis was free of legal error and consideration of the Director's conduct did not inappropriately taint the analysis. Nor did the hearing judge err in failing to give weight to the father's status as W.D.'s biological parent. These were her decisions to make. In awarding permanent custody to W.D.'s father, the majority of the Court of Appeal failed to afford the appropriate level of deference to the hearing judge's assessment.

A. *The Standard of Review on a Determination of the Best Interests of the Child*

[52] First and foremost, this appeal turns on the due operation of appellate deference in child custody matters. The parties argued about what the applicable standard of review should be when assessing a hearing judge's conclusions concerning custody in a child welfare context. In my view, *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 11, citing *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12, governs: an appellate court is not entitled to intervene unless there has been "a material error, a serious misapprehension of the evidence, or an error in law".

[53] The best interests of the child is the guiding principle in most custody matters, as it is under s. 2(2) of the *Child Protection Act*. To assess the best interests of a child, courts apply a multi-factorial legal standard, although different statutes may articulate the individual factors in slightly different ways. It is a highly contextual and fact driven exercise that involves a high level of judicial discretion: a case-by-case consideration of the unique circumstances of each child is the hallmark of the process.

Those factors include “not only physical and economic well-being, but also emotional, psychological, intellectual and moral well-being” (*Gordon v. Goertz*, [1996] 2 S.C.R. 27, at para. 120, per L’Heureux-Dubé J., dissenting, citing J. D. Payne, *Payne on Divorce* (3rd ed. 1993), at p. 279).

[54] In a child welfare context in P.E.I., the criteria that govern the best interests determination are set out in s. 2(2) of the *Child Protection Act*:

- (2) The best interests of the child means the interests that appear, to the Director, or to a court, to be best for the child under the circumstances, having regard to all relevant considerations, including
 - (a) the safety of the child;
 - (b) the capacity of a parent to properly discharge parental obligations;
 - (c) the physical, mental and emotional needs of the child, and the appropriate care or treatment to meet those needs;
 - (d) the physical, mental and emotional level of development of the child;
 - (e) the views of the child, where appropriate;
 - (f) a secure place for the child and the development of a positive relationship as a member of a family;
 - (g) the love, affection and ties between the child and persons who have had custody of the child;
 - (h) the love, affection and ties between the child and other persons in the life of the child;
 - (i) the cultural, racial, linguistic and religious heritage of the child;
 - (j) if the child is aboriginal, the importance of preserving the cultural identity of the child;
 - (k) the capacity of persons other than a parent to exercise custody rights and duties respecting a child;
 - (l) the continuity of care for the child and the possible effect of disruption of that care on the child; and

- (m) the difference in the concept of time, and the developmental capacity of a child.

[55] In this legislation, as in others, no priority is given to one factor over the other. The question of which factors are relevant, and what weight should be apportioned to them, is a matter of judicial discretion with regard to the evidence before the court. The evidence that lays the foundation for the factors must first itself undergo a discretionary determination by the judge, regarding its admissibility, credibility, reliability, and weight. Indeed, an assessment of a child's best interests can be conceptualized as requiring layered exercises of judicial discretion, in which the judge at first instance is "in the best position to assess evidence pertaining to the best interests of the child" (*P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 192, per Cory and Iacobucci JJ.).

[56] The leading decision on the appellate standard of review for custody and access decisions is this Court's decision in *Van de Perre*. It provides that such decisions are inherently an exercise of discretion (para. 13). As a result, an appellate court must act with restraint and may only intervene where there has been "a material error, a serious misapprehension of the evidence, or an error in law" (*Hickey*, at para. 12; *Van de Perre*, at para. 11). An omission is only a material error "if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (*Van de Perre*, at para. 15).

[57] This narrow scope of appellate review means that, absent a material error, the "Court of Appeal is not in a position to determine what it considers to be the correct

conclusions from the evidence. This is the role of the trial judge” (*Van de Perre*, at para. 12 (emphasis deleted)). An appellate court is therefore not permitted to redo a lower court’s analysis to achieve a result that it believes is preferable in the best interests of the child.

[58] The *Van de Perre* standard reflects the significant deference that the decision of a judge at first instance as to a child’s best interests attracts, owing to the polymorphous, fact-based, and highly discretionary nature of such determinations (*Hickey*, at para. 10). In my view, absent something specific in the governing legislation, this same standard applies to custody decisions pursuant to child protection legislation.

[59] Nothing in s. 2(2) of the *Child Protection Act* supports or suggests a different standard of appellate review. Further, the same justifications expressed in *Hickey* that animated significant deference to child support awards apply with equal force to custody disputes under child welfare legislation. In both cases, what is needed is an approach that promotes finality in family law litigation, recognizes the importance of the highly discretionary nature of the decision and the appreciation of the facts by the judge at first instance who heard the parties directly, and avoids giving parties an incentive to appeal judgments in the hope that the appeal court will have a different appreciation of the relevant factors and evidence (*Van de Perre*, at para. 11; *Hickey*, at para. 12).

B. *The Assessment of the Best Interests of the Child Was Free of Error*

[60] The hearing judge's determination of W.D.'s best interests was grounded in a thorough assessment of the extensive evidence in these proceedings. Consistent with her duties, the hearing judge carefully addressed the testimony from each witness, commented on their credibility, and where necessary, indicated the portions of their testimony she accepted. She then related this evidence to the statutory factors relevant to W.D.'s best interests in a thorough analysis. In light of the evidentiary record, the hearing judge conducted an assessment that discloses no material error, serious misapprehension of the evidence, or legal error. Her findings were entitled to considerable deference.

C. *The Hearing Judge Did Not Err in Considering the Director's Conduct*

[61] To the extent that the majority of the Court of Appeal impugned the hearing judge's decision for having been inappropriately influenced by the Director's actions, it not only failed to apply the deferential standard of appellate review; it also failed to appreciate the potential significance of the Director's conduct in a custody proceeding with a child welfare component. The problem with the majority's reasoning is that it ignores that the proceedings before the hearing judge had in fact commenced as a result of the Director's intervention. Most obviously, it disregards that the factual matrix before the hearing judge did not develop in a vacuum, but was shaped by the steps of the Director. I agree with Jenkins C.J.P.E.I. that impugning the hearing judge's reasons in this respect is tantamount to a request that she "wear blinkers" (para. 213).

[62] That the hearing judge was alive to how the Director handled W.D.'s file did not distract from the focus of her decision: W.D.'s best interests. The hearing judge expressly acknowledged that "[a]ssigning blame for what has taken place . . . is not the role of this court. Despite the actions of the Director's workers my sole focus must be and is the best interests of W.D." (para. 91). That statement of law is not only correct, it was applied assiduously throughout the judgment.

(1) The Judicial Supervisory Obligation for Children in State Care

[63] No general principle prevents a judge on a best interests of the child analysis from considering the actions of a child protection agency. Such inquiries are not only permissible, they may in some circumstances be *required* on account of the court's essential oversight role in child welfare matters and its *parens patriae* jurisdiction.

[64] The Director has the statutory responsibility to safeguard children and has broad investigative and apprehension powers to act in their best interests. Child protection workers perform an essential public service, under often arduous and challenging circumstances. The decision to place children in state care brings profound, life-altering consequences for children and families. "Few state actions can have a more profound effect on the lives of both parent and child" (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 76).

[65] Section 7 of the *Canadian Charter of Rights and Freedoms* “requires that this dramatic form of state intervention only take place in accordance with the principles of fundamental justice” (*Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R 519, at para. 15, per Arbour J., dissenting in the result). To ensure that child protection agencies exercise their jurisdiction only when warranted and with due fairness to children and parents, child protection statutes give courts the authority to supervise the exercise of an agency’s power (e.g., the *Child Protection Act*, ss. 27 and 29). This important role, with its attendant checks and balances, is exercised throughout the proceedings. Hence, even in the assessment of a child’s best interests, an agency’s decision-making process remains the proper subject of inquiry as part of the court’s oversight role. Similarly, the jurisdiction under *parens patriae* to act in the best interests of a child gives ambit to a superior court to take due notice of an agency’s conduct insofar as it impacts a child’s best interests.

[66] The hearing judge therefore committed no reviewable error by noting that the Director had over-held W.D. and breached the timeline prescribed under s. 41 of the *Child Protection Act*. As Matheson J. noted in a separate contempt hearing in this matter, “[w]hen a child is placed in the care and custody of the Director by a court, this care and custody is always under the supervision of the court” (2019 PESC 53, at para. 37 (CanLII)). As Matheson J. found, by July 16, 2019, the Director had exhausted the timelines under s. 41, and lacked the jurisdiction to hold W.D., direct his care, or transfer him to Alberta, without returning to court to seek a further period of apprehension.

[67] While judges must not lose sight of the child's best interests, they should also not fear appellate intervention for exercising their supervisory functions by referring to or reviewing a child protection agency's conduct. Provided the focus remains on the applicable legal principles, it is in everyone's best interest that the checks and balances established in child welfare legislation are front of mind for all decision makers, including judges undertaking a best interests analysis.

(2) The Director's Conduct Situated the Status Quo and the Director's Position

[68] In addition to the supervisory function of the courts, a child protection agency's conduct can provide crucial context for understanding the status quo and the position taken by the agency in the proceedings.

(a) *Situating the Status Quo*

[69] In custody proceedings involving a child protection agency, an agency's conduct may have shaped, even defined, the factual matrix before the court, including the parties' positions and conduct, and the status quo relevant to a child's best interests. In the case at bar, after the initial apprehension, the Director directed every aspect of W.D.'s life: including where and with whom he lived, where he went to school, and who could see him when and the terms of their access. It was, therefore, not a legal error for the hearing judge to consider the Director's conduct insofar as it allowed her to gain an understanding of what had happened, how a certain status quo was created, and the conduct and position of the parties.

[70] Here, the hearing judge thought it was necessary to consider the Director's conduct to be in a position to properly assess the nature and extent of the father and the grandmother's involvement in W.D.'s care in the months before the disposition hearing. By situating the relationship between W.D. and each of his potential caregivers as a function of the access and visitation rights offered to them by the Director, the hearing judge was able to assess the evidence and appreciate how some bonds may have come to be strengthened and others may have been weakened. It was clearly open to the hearing judge to take into account the different treatment provided to the father and the grandmother and to conclude that the Director promoted W.D.'s relationship with his father over the pre-existing connection with his grandmother by: arranging a two-week visit in P.E.I., granting daily visits that graduated from fully to completely unsupervised overnight visits in a matter of 12 visits; permitting W.D. to go to Alberta for a second visit; allowing W.D. to enroll in school in Alberta and to stay there pending the disposition hearing; and working with the father and the expert psychologist on the content of his parenting plan.

[71] The hearing judge was of the view that she could not fairly assess the grandmother's parenting plan without also understanding the Director's limitations on the grandmother's access and how W.D. was removed from her daily care. It is not an error to consider whether such actions may have interfered with the continuity and closeness of their relationship. During the four weeks in which the Director placed W.D. with foster parents, the grandmother was permitted only 4 hours per week of supervised visits, despite having provided continuous day-to-day care for W.D. for

more than 12 months. Her FaceTime calls were sporadic and monitored by supervisors. Similarly, when the grandmother was able to visit W.D. in Alberta, the Director permitted the grandmother to visit with W.D. for a mere three hours on Friday, three hours on Saturday and one hour on Sunday. The Director also required those visits to be supervised and limited to public places, and denied the grandmother's request to have W.D. stay overnight with her in the hotel. The hearing judge also observed that the Child in Care Social Worker employed by the Director herself agreed that while the Director had the onus of making decisions in W.D.'s best interests to help support his family relationships, no initiatives were taken in this regard in respect of W.D.'s P.E.I. family.

[72] The hearing judge was allowed to consider how any unbalanced facilitation of access the Director gave to each parent would have had an impact on their bond with W.D. A judge assessing the best interests of the child has the authority to address how the Director's decisions may have serious implications in the best interests analysis. In a different context, the fact that a parent only saw a child once, for a three-day period, in six months may support a finding of a limited desire to have a close connection with the child. When that fact is attributable to the Director's decisions, the implications and available inferences change dramatically.

[73] In the same vein, the Director's decisions structured the status quo as it existed at the time of the disposition hearing and the hearing judge was well within her authority to understand how that status quo came about. In many cases the status quo

is an important consideration when assessing the best interests of children (see *Beson v. Director of Child Welfare (Nfld.)*, [1982] 2 S.C.R. 716, at p. 728; *K.L.W.*, at para. 18). However, courts have also recognized that in certain circumstances, it is *inappropriate* to give effect to an existing state of affairs. For example, return and retention orders restore the status quo that existed before a wrongful removal or retention (*Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at para. 24; *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 579-81). While the father pressed the status quo of W.D. living in Alberta before this Court, a status quo created from compounded actions or errors on the part of a child protection agency or others may require scrutiny. A court is entitled to look behind the veil of an existing status quo to understand how it came about and to assess whether that status quo is itself in the child’s best interests.

[74] In assessing the best interests of a five-year-old autistic child, the hearing judge was entitled to take into consideration that W.D. remained in his grandmother’s care for more than one year until the Director, without notice, abruptly took him away, placed him with another foster parent for four weeks, and then sent him to Alberta to stay with the father so that it could begin to assess the father’s parenting abilities given that he had never parented a child. The hearing judge was also within her authority to find that this dramatic removal was based on “flimsy” reasons and that the possibility of the grandmother continuing to care for W.D. was ignored. Her conclusion that it was “evident to the court that despite the significant progress W.D. had made in more than one year of [his grandmother]’s day to day care, W.D.’s family in P.E.I. was being

discarded in favour of [the father]”, was one she was authorized to make (paras. 80 and 85).

(b) *Situating the Director’s Position and Actions*

[75] Similarly, the hearing judge could consider how a child protection agency’s conduct may help situate or explain the position taken by an agency either inside or outside of court. Faced with representations from a child protection agency regarding the fitness of parents, a court should not be prohibited from considering the manner in which the agency investigated and treated the parties involved to assess the weight that can be placed on such evidence or arguments. This ability to weigh such evidence takes on particular significance where, as here, an agency has, at any point in the proceedings, supported one potential caregiver over another. Here, the hearing judge committed no error in taking into account the Director’s prior conduct, including its prior statements and the investigation and level of scrutiny employed *vis-à-vis* each parent, to assess the Director’s position at the disposition hearing.

[76] It was open to the hearing judge to find that the Director’s professed neutrality at the hearing was “simply not credible”, that the “scales were tipped” by the Director in favour of the father; and that the Director’s actions had “effectively tied the court’s hands” (paras. 89-90). She specifically rejected the child protection worker’s testimony that the Director was not promoting the plan of care of either parent based on her answers in cross-examination. The hearing judge concluded that the timeline of events showing the different actions and decisions taken by the Director

“demonstrate[d] a plan which contradicts the Director’s stated submission of not supporting” either the father or the grandmother in their plans of care (para. 87). She was also within her remit to question why the Director chose at one point to support the father’s custody and ask why, if the Director truly had no concerns with either parent, she did not remove herself from the process to allow the parents to advance their competing custody claims via the appropriate legislation, instead of under the *Child Protection Act*.

(3) The Director’s Conduct Grounded the Assessment of the Evidence

[77] In addition to fulfilling the court’s oversight role and informing background considerations, the hearing judge could also turn to the Director’s evidence and conduct to allow her to properly assess (1) the claims made by the father and the grandmother as to their appetite and ability to facilitate access with the other parent, and (2) the impartiality of the expert witness and the weight to be given to her evidence.

(a) *The Parents’ Willingness to Facilitate Access*

[78] The Director’s evidence was used to help the hearing judge evaluate the claims of each parent regarding their willingness to facilitate contact with the other. The hearing judge found that the Director removed W.D. from the grandmother’s care for “flimsy” reasons, and that the grandmother did not engage in negative messaging about the father. These findings underpinned her conclusion that the grandmother was

more likely to foster W.D.'s relationship with his father than vice-versa; a point on which the final determination came to rest.

[79] Specifically, had the Director actually ended the foster parent arrangement with the grandmother out of genuine concerns around “negative messaging”, the grandmother’s claims that she would foster W.D.’s relationship with the father would have been less credible and compelling. Relatedly, the father’s reluctance to allow W.D. to visit with the grandmother due to her “negative messaging” would have been more reasonable. The hearing judge’s assessment of the Director’s evidence necessarily lent greater credibility and weight to the grandmother’s denials and reduced the reasonableness of the father’s reluctance to allow W.D. to visit with the grandmother due to her “negative messaging”. She committed no error in this regard.

(b) *The Expert Evidence*

[80] I also cannot agree with the majority of the Court of Appeal that the hearing judge’s views regarding the conduct of the Director inappropriately impacted her decision to accord limited weight to the expert psychologist’s view that W.D. should live with his father.

[81] The hearing judge took a measured approach: she qualified this expert, admitted her report and accepted her evidence about the father’s parenting abilities, saying it gave the court some comfort. However, she gave limited weight to the expert’s opinion about what placement was in the W.D.’s best interests, the ultimate issue the

hearing judge was to decide. The hearing judge observed that the expert's evidence had its limits in assisting on the ultimate decision of what was in W.D.'s best interests because the expert's involvement with the father may have "clouded her view" that W.D. would equally benefit from an alternative arrangement (para. 109).

[82] The majority of the Court of Appeal overturned the hearing judge on this point, substituted its view of how the expert's evidence should have been weighed, and granted custody to the father in part on this basis. With respect, the hearing judge committed no reviewable error and she was entitled to determine the weight to be given to the expert's opinion on this point.

[83] The hearing judge was obliged to consider the objectivity and impartiality of the expert opinion evidence to ascertain both its threshold admissibility and the weight that should ultimately be ascribed to it (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 32; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 106). That the expert psychologist was engaged first by the father as a private professional to provide assistance about how to parent and then retained by the Director as a purportedly neutral observer to assist in evaluating the father's abilities to parent, creates the very type of *prima facie* conflict of interest or fear of allied interests that would entitle the hearing judge to assess the impact, if any, this dual relationship had on the admissibility and weight of the expert evidence presented (see N. Bala and J. Thomson, *Expert Evidence and Assessments in Child Welfare Cases* (2015), at pp. 25-26).

[84] As the “gatekeeper” of evidence, it was well within the hearing judge’s purview to determine the weight to be given to this part of the expert’s opinion (*The Queen v. Lupien*, [1970] S.C.R. 263, at p. 280, see also *White Burgess*, at para. 20). The hearing judge was not required to adopt an “all-or-nothing” approach to the evidence (see *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 266). She observed that the expert was not impartial on this issue and that she was not in a position to offer an informed opinion about the relative merits of each parent’s claims because although she had first-hand knowledge of the father’s abilities, her appreciation for the grandmother’s ability was only second-hand and sourced from the Director. Hence, she was not in a position to undertake a fair and reliable comparative analysis of W.D.’s best interests as between these two parents, and in turn, advance an opinion on his placement. The hearing judge was within her authority to conclude that while the expert’s evidence was probative insofar as it spoke to the father’s parenting abilities, her evidence merited less weight when she opined on W.D.’s ultimate placement. There is no material error that would allow appellate intervention on this finding and her determination deserved deference.

D. *The Hearing Judge Did Not Err in Her Approach to the Father’s Biological Ties*

[85] The grandmother submits that the majority of the Court of Appeal erred in effectively resurrecting a presumption in favour of biology when it awarded custody to the father. She cites the majority’s conclusion that a biological parent is preferred when two prospective custodial parents are otherwise equal.

[86] For the father, the role of biological ties has shifted over time. At the early stages, when the father's relationship with W.D. was new, his claim as W.D.'s biological father was asserted more forcefully, arguing at the disposition hearing that, as the natural parent, he had a preferred status in W.D.'s custody. As his bond with W.D. has grown over time, however, the father increasingly relied on his emerging parenting skills, his deeper connection to W.D. and the status quo. Nevertheless, before the Court of Appeal, he asked that the "parental presumption principle", or the principle that the "welfare of the child is best served in the custody of [the child's] natural parent" be recognized (paras. 183-84 (emphasis omitted)). Before this Court, with the expert psychologist's evidence and the Director's statement that there are no concerns with his parenting, he says this case is "not about biology" and agrees there is no presumption favouring biological parents.

[87] I agree with the grandmother that the majority of the Court of Appeal overstated the importance of the father's biological tie to W.D. While the majority found there was no presumption in favour of biology, it concluded biological parenthood was "very important" and held courts should consider it a decisive tie-breaker when a parent and non-parent were otherwise equal (at para. 112). As I will explain, in this custody dispute, a parent's mere biological tie is simply one factor among many that may be relevant in some cases to a child's best interests, which is and must be the paramount consideration. Judges are not obliged to treat biology as a tie-breaker when two prospective custodial parents are otherwise equal.

(1) The Historical Approach to Biology in the Assessment of a Child's Best Interests

[88] Courts have gradually moved away from an emphasis on parental rights and biological ties in settling custody matters, whether arising from a private dispute, an adoption, or the state's apprehension of children in need of protection.

[89] The transition away from parental rights and biological ties occurred over several centuries and involved shifts brought about by legislative intervention as well as judicial innovation. The step that is most important for this case is *King v. Low*, [1985] 1 S.C.R. 87, a decision of this Court, that ended the presumptive right of custody in favour of natural parents over adoptive parents that this Court established in the 1950s (see *Re Baby Duffell: Martin v. Duffell*, [1950] S.C.R. 737, at p. 744; *Hepton v. Maat*, [1957] S.C.R. 606, at pp. 607-8 and 615; and *Re Agar; McNeilly v. Agar*, [1958] S.C.R. 52, at p. 53). In *King v. Low*, a mother gave her newborn son to a couple for adoption. Before the adoption process was over, the mother requested the child's return, which the couple refused, and a custody dispute ensued. At trial, custody was awarded to the adoptive parents. The judge concluded the benefits of stability and the child's bond with his adoptive parents outweighed the benefit of his biological mother's care.

[90] Writing for the Court, McIntyre J. upheld the decisions of the courts below. In doing so, he recognized several principles that are relevant in this appeal. The "paramount consideration", he noted, in custody disputes involving a "natural" parent and another parental figure is the welfare of the child (p. 93). The preference for natural

parents developed in the adoption context, where only one party was a natural parent. Further, McIntyre J. endorsed the trial judge's conclusion that a natural parent is preferred not because of biology *per se*, but due to the emotional or psychological bond that is presumed to develop when a parent begins to care for a newborn. The question of which prospective custodial parents developed this bond is a consideration that should prevail over an "empty formula", like a biological tie (p. 104). The legal significance of biological ties in the best interests assessment, moreover, has diminished with "changing social conditions and attitudes" (p. 97).

(2) Biological Ties Will Generally Carry Limited Weight in the Assessment of a Child's Best Interests

[91] As noted, *King v. Low* rejected that biological parents have a *prima facie* entitlement to their child's custody, concluding a child's best interests is the paramount consideration in custody disputes. Legislation now often dictates that it is also the *sole* consideration (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 37, per L'Heureux-Dubé J., dissenting in the result; see also *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 132).

[92] It is also now common for legislatures to enumerate a non-exhaustive list of factors applicable to a child's best interests in a given context (A. Wilton, G. S. Joseph and T. Train, *Parenting Law and Practice in Canada* (loose-leaf), vol. 1, at § 6:1). For example, the *Divorce Act* sets out best interests factors which govern custody disputes between persons who are divorcing (*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 16(3)). Similarly, provincial and territorial statutes establish best

interests considerations that govern between non-married persons (e.g., *Family Law Act*, S.A. 2003, c. F-4.5, s. 18; *Children's Law Act*, R.S.P.E.I. 1988, c. C-6.1, s. 33). Other statutes, which more directly involve the state, like child welfare legislation and adoption laws, also establish criteria to determine what is in the child's best interests (*Child Protection Act*, s. 2(2); *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. C-12, s. 2(1)).

[93] Statutory factors provide the starting point for assessing the relevance of biological ties. When assessing a child's best interests, a court should consider any applicable factors enumerated in the pertinent legislation (*Van de Perre*, at para. 9). Statutory factors offer clarity, structure, predictability and represent a legislature's views on which factors are important based on "decades of careful study into children's needs and how the law can best meet them" (*A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 92; see also N. Bala, "Bringing Canada's *Divorce Act* into the New Millennium: Enacting a Child-Focused Parenting Law" (2015), 40 *Queen's L.J.* 425). Given the progressive shift away from biological ties in Canada's legal history, a legislature's decision to omit biology among the relevant statutory factors to the best interests of the child assessment also reflects a decision to downplay its significance.

[94] In this case, the starting point is the list of factors enumerated in s. 2(2) of the *Child Protection Act*. Here, some express factors may implicate biology, like taking into account the child's aboriginal, and/or cultural, racial, linguistic and religious

heritage (s. 2(2)(i)(j)). However, none of the enumerated factors specifically relate to a parent's biological ties. Paragraphs (g) and (h) refer to the "love, affection and ties" between the child and persons who have had custody of the child or other persons in the child's life. As "ties" is coupled with the words "love" and "affection", the principle of statutory interpretation that the meaning of a term is known by its associates implies the "ties" at issue are the child's emotional or psychological ties (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 8.58; 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 195). While other statutes may be different, the statutory factors applicable in this case, therefore, do not direct a court to consider a child's biological relationship with the party seeking custody. In light of this omission, the *Child Protection Act* accords little weight to biology as it impacts the best interests of the child assessment.

[95] It is true the *Child Protection Act* affords various rights to "a parent", including the right to counsel under s. 30. However, it must first be acknowledged that these procedural rights are not afforded to *biological* parents alone. The definition of "parent" reflected in s. 1(s) of the *Child Protection Act* is broad and inclusive. It includes a birth or adoptive parent (s. 1(s)(i)). But it also includes a person who has stood *in loco parentis* for over a year (as here) (s. 1(s)(ii)), a legal guardian (s. 1(s)(iii)), or a person responsible for the child's care and with whom the child resides (s. 1(s)(iv)). The *Child Protection Act's* preamble references the need to ensure children are removed from their parents' care only when other measures have failed. Yet, given a "parent" includes biological and non-biological parents, the preamble applies to both

alike. The legislation is not protecting or privileging blood ties: it is setting out procedural safeguards for all of those individuals, with or without a biological tie to the child, who have a connection with the child as a statutorily defined “parent”.

[96] Further, these rights are a response to the state’s authority to remove children from their existing families and reflect the significant impact such proceedings have on children and parents alike. Parents are afforded several procedural protections to ensure the proceedings are fair, including a right to counsel (*G. (J.)*, at paras. 70-75, citing *La Forest J. in B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 88). The procedural rights afforded to parents under the statute, however, do not add greater weight to biological ties in the assessment of a child’s best interests under the *Child Protection Act* or otherwise.

[97] In the end, the child’s best interests is the paramount consideration in child protection proceedings (*G. (J.)*, at para. 72). State apprehension is warranted when maintaining a child’s existing family relationship is no longer in the child’s best interests (*Catholic Children’s Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, at p. 203). This aligns with the balance that child protection legislation attempts to strike between a child’s best interests and preserving their existing family unit (*M. (C.)*, at p. 196; see also M. J. Schlosser, “Third Party Child-Centred Disputes: Parental Rights v. Best Interests of the Child” (1984), 22 *Alb. L. Rev.* 394, at p. 409).

[98] In any event, the concern in the preamble for ensuring children are removed from their parents only when others measure have failed is not in play when the state is not seeking custody, as is the case here.

[99] To sum up, the applicable statutory factors in this case do not direct a court to weigh biology in the assessment of a child's best interests. Indeed, the omission signals that relatively less weight ought to be afforded this factor. But the statutory factors are non-exhaustive. The question remains, then, whether it is within a court's discretion to assign weight to biological ties as a non-enumerated factor.

[100] I agree with the majority of the Court of Appeal that a court *may* consider biological ties in assessing a child's best interests if they have some link to the child's best interests. The majority, however, overstated the importance of a biological tie in itself when it concluded it was an "important, unique and special" factor that must be a tie-breaker when two prospective custodial parents are otherwise equal (paras. 111-13). Further, I disagree with the majority that biology has any relevance in a case like the one at bar, where both legal parents have biological ties and nothing in the record establishes that one type of tie is better than the other.

[101] It is not an error, in my view, for a court to consider a biological tie in itself in evaluating a child's best interests under this act, even though courts should be reluctant to superimpose the factor onto a statute when a legislature has omitted it, since courts and legislatures have progressively moved away from biological ties. Nevertheless, courts have considerable discretion in identifying and weighing the

factors that are relevant in a given case (*Van de Perre*, at paras. 11-13, citing *Hickey*, at paras. 10 and 12). As a result, a court may conclude the evidence supports assigning weight to a biological tie if it can make the link to a child's best interests. That said, a biological tie in itself should generally carry minimal weight for several reasons.

[102] First, too great an emphasis on biological ties may lead some decision makers to give effect to the parent's claims over the child's best interests. Parental preferences should not usurp the focus on the child's interests. As Wilson J. wrote in *Racine v. Woods*, [1983] 2 S.C.R. 173, at p. 185: ". . . a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations."

[103] Second, *King v. Low* concluded that a child's *bond* is a consideration that should prevail over the "empty formula" of a biological tie (para. 104). *King v. Low*'s statement that a biological parent's claims should not be "lightly" set aside must be read in the adoption context in which it arose and alongside the Court's ultimate emphasis on the child's bond (para. 101). *King v. Low* implies that biological parents' claims must not be "lightly" set aside only because a biological tie is a presumed proxy for the parent with whom a child has the closest emotional or psychological bond. A child will frequently have a strong attachment to a biological parent as they are generally among the persons most involved in the child's care. Yet this does not confer significant weight to a biological tie in itself. It is the biological parent's caregiving

role that fosters a child's psychological and emotional attachment, not the biological tie itself.

[104] There is “no magic to the parental tie” (*Young*, at p. 38, per L’Heureux-Dubé J., dissenting in the result). The very need for child protection legislation underscores that a biological connection is no guarantee against harm to a child. On the other hand, a child can be equally attached to persons who are not their biological parents and those persons can be equally capable of meeting the child’s needs, as this case and *King v. Low* illustrate. Thus, *King v. Low* does not give significant weight to a biological tie in itself, but treats it as a presumed proxy for a child’s strongest bond.

[105] Since biological ties are a presumed proxy for a bond, any advantages that favour the biological parent will usually be captured and subsumed within the broader inquiry into a child’s best interests. In particular, if the biological parent is closer to the child, and better able to meet the child’s needs, this will be reflected in a wider range of relevant factors, like the child’s relationship to the parent, the views and preferences of the child, and the ability to meet the child’s needs, including the child’s safety, security, and well-being (Wilton, Joseph and Train, at § 6:1). To the extent a parent relies on biology for considerations related to the child’s culture, race or heritage, it may be addressed within those factors.

[106] Third, the benefit of a biological tie itself may be intangible and difficult to articulate (*British Columbia Birth Registration No. 99-00733, Re*, 2000 BCCA 109,

73 B.C.L.R. (3d) 22, at para. 117). This makes it difficult to prioritize it over other best interests factors that are more concrete. For example, in this case, the decisive factor was which parent was more likely to foster W.D.'s relationship with the other parent. This factor clearly benefits the child: it ensures the child is placed with the parent who will best promote the child's emotional and psychological relationship with the other parent. In comparison, the benefit of the father's biological tie itself is harder to identify. Further, any benefit from a connection to a biological parent, such as a "sense of security" in knowing one's "roots", as the majority of the Court of Appeal put it, may be achieved through access and parenting time rather than custody (para. 111).

[107] As well, the importance of biological ties may diminish as children are increasingly raised in families where those ties do not define a child's family relationships. Family institutions have "undergone a profound evolution" and changing social conditions, as noted, have diminished the significance of biological ties (*Young*, at p. 43; *King v. Low*, at p. 97). Change and evolution continues today. Contemporary shifts in parenting and family composition may undermine the relevance of biological ties.

[108] Finally, as in this case, courts should be cautious in preferring one biological tie over another absent evidence that one is more beneficial than another. This Court has moved away from stereotyped and formulaic solutions like the "tender years" doctrine (*Young*, at p. 43; *A.C.*, at para. 92). Unsupported generalizations about, as in this case, the caregiving capacity of a biological father versus a grandmother, or

vice versa, are similarly inappropriate. Comparing the closeness or degree of biological connection is a tricky, reductionist and unreliable predictor of who may best care for a child. It fails to take into account how often other family members assume care for children whose biological parents cannot act as caregivers as a result of addictions, mental health issues, criminal behavior, or other challenges. It also overlooks that a custody dispute that is superficially between two biological parents may frequently draw in several family members, as a parent's extended family may also assist in care and feel invested in seeing a custody claim succeed. Here, not only did the grandmother step up to assist her daughter to care for W.D., but the father's parents also help him with W.D.

[109] For these reasons, I disagree with the majority of the Court of Appeal that biology must be a tie-breaker when two parties are otherwise equal under this legislation. A court is not obliged to turn to biology and engage in a fraught determination of who may be a closer blood relative. While biological ties *may* be relevant in a given case, they will generally carry minimal weight in the assessment of a child's best interests.

(3) Biology Does Not Carry Significant Weight in This Case

[110] The hearing judge made no error in her approach to the father's biological tie to W.D. The record did not enable the hearing judge to assign even limited weight to this factor. Both parties are "parents" under the *Child Protection Act* and each have a biological tie to W.D. Nothing in the record enabled the hearing judge to place greater

weight on the father's biological relationship. I would add, in this case, the father also did not argue that his biological tie was relevant to considerations related to aboriginality, culture, heritage or race.

[111] The hearing judge did not fail to consider W.D.'s bond with his father or fail to hear the father's argument. She clearly knew of this relationship and in assessing W.D.'s best interests, she expressly noted that W.D. "loves and appears to feel secure" with his father and his father's family (para. 205).

[112] Finally, the hearing judge was not compelled to decide in favour of the father after concluding the two parties were more or less equal. It was open to her to dispose of this case based on a factor that she considered more significant: the question of which parent was more likely to maintain the W.D.'s relationship with the other parent.

VI. Disposition

[113] Pursuant to this Court's judgment issued from the bench on December 2, 2021, and for the above reasons, the decision of the Prince Edward Island Court of Appeal was set aside and the decision of Key J. to award permanent custody and guardianship to the grandmother pursuant to s. 38(2)(e) of the *Child Protection Act* was affirmed. W.D. was to remain with the father until March 21, 2022 and thereafter be returned to P.E.I. at the expense of the Director. The appeal was allowed with costs throughout to the grandmother.

[114] The Court's judgment affirming the permanent custody and guardianship to the grandmother under s. 38(2)(e) of the *Child Protection Act* is binding and enforceable.

Appeal allowed with cost throughout.

Solicitors for the appellant: Cox & Palmer, Charlottetown.

Solicitors for the respondent: Stewart McKelvey, Charlottetown.

Solicitor for the intervener Director of Child Protection for the Province of Prince Edward Island: Department of Justice and Public Safety, Charlottetown.

Solicitors for the intervener LGBT Family Coalition: IMK, Montréal.